SKYPE AT THE BORDER: A QUALITATIVE ANALYSIS OF VIDEO TELECONFERENCING IN IMMIGRATION COURT PROCEEDINGS DURING THE TRUMP ERA

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Abstract

Since 1996, immigration courts have used video teleconferencing (VTC) in immigration court proceedings surfacing questions about the ethicality of its use. Initially, scholars raised strong arguments against the use of VTC because of the inability to build trust between respondent and judge through video-mediated communication. Later, Ingrid Eagly, a law professor at UCLA, found that the correlation between depressed rates of relief in detained cases conducted via video teleconferencing was a consequence of litigants' disengagement with the legal process involved in applying for relief. To evaluate the current use and impact of VTC on immigration court proceedings during the Trump Era, I interviewed immigration attorneys and law students, as well as visited detention centers and observed an immigration court proceeding. I found that restricting access to the legal resources necessary to navigate the U.S. immigration system exposes much deeper, more structural inequities in our asylum system. The prevalence of video-mediated communication is but a symptom of this inequality, a tool in the detention-to-deportation timeline.

Part 1
Statement of the Problem

"Coming to the U.S. was very unexpectedly horrific. When I was 12 years old, the only thing I was thinking about was surviving. I didn't want to die," said El, a young Guatemalan girl, in the documentary film, *A Line Birds Cannot See* (2019). The animated short film, narrated by El, follows her journey from Guatemala to the United States. While heartbreaking, El's narrative represents one variation of a story told by tens of thousands of migrants at the southwest border. The film, only nine minutes and fifty-seven seconds long, brings a frequently untold personal migrant narrative to light that would otherwise be lost in the saturated media landscape of immigration accounts told by outsiders.

For those attempting to enter the United States at the southwest border, constant changes in U.S. immigration policy that aim to curtail illegal entry make the path to the north far from safe.[1] El's mother fled Guatemala in part to escape an abusive husband, leaving El and her siblings behind with the hopes of one day reuniting her family in the United States. For El, her mother's departure was the first of many separations she would endure. Fortunately, her mother managed to return to Guatemala and brought her children to the U.S. Her mother and siblings sold all their possession, left their abusive father in Guatemala, and paid a *coyote*, a person or group that smuggles migrants into the United States, to guide them on their journey. Per the advice of the coyote, El separated from her family to join another group. This decision left a 12-year-old girl, alone and walking in the desert landscape near Nuevo Laredo and Laredo. Customs and Border Patrol (CBP) apprehended El near the border, tired, dehydrated, and hungry. Instead of processing her to return her back to Guatemala or present her with the alternative to apply for

[1] Operations that have grown out of the demand for illegal entry into the U.S. include human smuggling and sex and drug trafficking.

asylum, CBP released her in Nuevo Laredo, Mexico, knowing she had nothing and nowhere to go. Desperate for help, El trusted the first people that offered her shelter. For several months, men kept El as a sex slave in the basement of their home in Nuevo Laredo. One night, El escaped her captors and knocked on the door of a house she deemed safe. Fortunately, the woman that answered provided help and assisted El in reuniting with her mother, who had safely arrived in the United States. Even though they reunited, living in the U.S. as undocumented immigrants and eventually being processed through the immigration system was their next battle to overcome. The acceptance or denial of the status for migrants like El and her family rests in the hands of immigration courts.

Court typically evokes an image of a large room built out of mahogany colored wood: a gallery filled with rows of long benches leading to the area reserved for those involved with the case. The attorneys sit with their clients before a judge in a long, black robe perched upon the bench. An American flag stands tall behind the magistrate with the words, "In God We Trust," carved in wood and covered with gold leaf resting above their head. Jurors, completing their civic duty, sit quietly to the side. The setting exudes the authority of a place where consequential, potentially life-altering decisions are made.

Immigration court proceedings, however, do not live up to the grandiose aura of criminal trial in made-for television dramas. Aaron Haas, a judge on the Texas 285th District Court, describes what a significant number of immigration courts in the United States look like today:

> "Observers are likely to see a small room located deep within a large federal building, with two tables perpendicular to one another, connected to form a right angle. A lawyer sits at each table, one representing the government and the other an alien. A row of chairs, behind these tables and against the walls, seat the family and friends of the alien. On the other side of the room, in view of the advocates and observers, is a television screen with a camera on top. This screen shows the judge on

> one side, who may be located in another state, and the alien on the other side, who is seated in a detention center in a third location."[2]

Haas relates the experiences many asylum seekers face while petitioning for legal status in the United States. The judge, immigrant's attorney (if they have one), government-appointed attorney (TA), and interpreter sit in the court room, while the asylum-seeker remains in a detention center with a video camera and monitor. Those in the immigration world know this practice as video teleconferencing (VTC). Legal researchers and advocates have voiced their concerns with the use of VTC in lieu of in-person hearings in the past; however the federal government has remained steadfast in their belief that VTC leads to more efficient and cost-effective immigration trials. Moreover, attorneys and organizations that advocate for the rights of immigrants in this day and age have said that Trump is issuing a war on asylum and VTC is one of the many weapons in the Trump Administration's arsenal.[3] My research aims to assess the validity of the government's support of VTC on the one hand and the deep concerns of immigration advocates on the other.

Part One presents an overview of U.S. immigration history and the asylum system, assesses the current issues at hand with the Trump administration and video teleconferencing, and discusses the methodology and limitations of the study. Part Two presents a literature review of academic works on video teleconferencing, focusing on a 2015 study by UCLA law professor Ingrid Eagly, which quantitatively and qualitatively analyzed the impact of VTC on immigration court proceedings from 2012. Part Three presents the findings from interviews I conducted with Texas immigration attorneys and law students as well as reflections from Hutto Detention Center

[2] Aaron Haas, "Videoconferencing in Immigration Proceedings" 5, no. 1 (n.d.): 59.
[3] Immigration Justice Campaign. "The War on Asylum." Webinar. March 31st, 2020.

and San Antonio Immigration Court visits. Part Four offers recommendations for U.S. immigration departments who use VTC going forward.

Brief History of Immigration and Asylum in U.S.

"Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"
-The New Colossus by Emma Lazarus 1883

For a deeper understanding of asylum and the current immigration policies put in place by the Trump administration, one must understand the duality that underscores immigration in the United States.

U.S. immigration policy—past, present, and future—is and always will be a story of two conflicting ideologies that ebb and flow.[4] According to *Strangers in the Land: Patterns of American Nativism, (1860-1925)* by John Higham, a prominent American historian during the early twentieth century, the United States straddles two principles: a cosmopolitan and democratic ideal of nationality and a traditional and conservative ideal of nativism.[5] For Higham, the United States represents both a home of and for immigrants but also a place where strong xenophobic sentiment thrives. In a later book from 1984 titled *Send These to Me: Immigrants in Urban America,* Higham clarifies, "one legend puts the immigrant, and all he represents, at the center of the American experience. Another relegates him to the peripheries."[6]

The notion of the United States as a safe haven for immigrants dates back to its founding. During the seventeenth century, Puritans fled Europe to the American colony in search of a place

[4] John Bodnar, "Culture without Power: A Review of John Higham's Strangers in the Land," ed. John Higham, *Journal of American Ethnic History* 10, no. 1/2 (1990): 80–86.
[5]Bodnar, John. "Culture without Power: A Review of John Higham's Strangers in the Land." Edited by John Higham. *Journal of American Ethnic History* 10, no. 1/2 (1990): 80–86.
[6] Higham, John. "Send These to Me. Immigrants in Urban America." The Johns Hopkins University Press: Baltimore and London. 1984. Pg, 4.

to practice religion freely. As the United States formed, immigrants entered and left as they pleased. It would not be until 1875, almost a full century after American independence, that the federal government put in place its first restrictive immigration law. However, even as the United States slowly began erecting borders and creating a legal immigration system, the nation had already solidified its reputation as a land of immigrants and Lady Liberty's torch led the way.

According to Higham, Americans had strongly adopted immigration as a pillar of American cultural identity during the early nineteenth century.[7] Decades earlier, essays written by the French American author, Michael-Guillaume-Jean de Crevecoeur, in 1782 already reflected that truth. Jean de Crevecoeur, an early settler, fled to Europe after the American Revolution broke out and wrote about his experience emigrating to the United States and the general socio-religious climate in the American colonies at the time.[8] The twelve essays titled *Letters from an American Farmer*, did exceptionally well commercially. Within two years of being published eight editions were disseminated in five countries.[9] Jean de Crevecoeur wrote that, "[In America] individuals of all nations are melted into a new race of men whose labors and posterity will one day cause great changes in the world."[10] His words introduced the notion of the "American melting pot," an enduring metaphor that has portrayed the United States as a "land of opportunity" where race, religion and nationality are not barriers to social mobility and wealth.[11] In the twenty-first century, however, many progressive thinkers have moved away from the term "melting pot" and have opted instead for terms like the "salad bowl" that promote

[7] Bodnar, "Culture without Power."
[8] The Editors of Encyclopaedia Britannica, "Michel-Guillaume-Saint-Jean de Crèvecoeur," in *Encyclopædia Britannica* (Encyclopædia Britannica, inc., January 27, 2020).
[9] The Editors of Encyclopaedia Britannica.
[10] John De Crévecoeur, *Letters from an American Farmer* (New York: Duffield & Company, 1904).
[11] Charles Hirschman, "America's Melting Pot Reconsidered," *Annual Review of Sociology* 9 (1983): 397–423.

multiculturalism.[12] Regardless, both terms evoke what Higham meant by "cosmopolitan and democratic idea of nationality." Yet pluralism and xenophobia are not mutually exclusive.

As the United States slowly unified after the Civil War, nationalism and nativism grew. Nationalism, the collective unification over a national identify, and nativism, the unfavorable opinion of outsiders, are different sides of the same coin.[13] Like a pendulum swinging, the socio-economic and political environment in the United States changes in response to national and global events. Those changes can quickly transform nationalism into nativism. The passage of the immigration bills that radically altered the immigration system in the United States—the Immigration Act of 1924, 1965 Immigration and Nationality Act and 2002 Homeland Security Act—demonstrate the influence of outside factors that determine the oscillation between a "salad bowl" America and an exclusionary one.

The 1924 Immigration Act, also known as the Johnson-Reed Act, put in place a qualitatively discriminatory and restrictive quota system that governed legal immigration into the United States for forty years. It further cemented extant xenophobic legislation governing American immigration, like the Chinese Exclusion Act of 1882, which prohibited the immigration of "skilled and unskilled and Chinese employed in mining" to the US and declared all Chinese as ineligible for naturalization.[14] Today, observers note historical parallels between Trump's so-called "Muslim Ban" and the Chinese Exclusion Act demonstrating the influence of immigration laws centuries after their enactment.[15] Congress and President Coolidge passed the

[12] Theresa E. McCormick (1984) Multiculturalism: Some principles and issues, Theory Into Practice, 23:2, 93-97, DOI: 10.1080/00405848409543097

[13] Nenad Miscevic, "Nationalism," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2018 (Metaphysics Research Lab, Stanford University, 2018), https://plato.stanford.edu/archives/sum2018/entries/nationalism/. Bodnar, "Culture without Power."

[14] Wu, Yuning, "Chinese Exclusion Act: United States 1882," Encyclopedia Britannica, https://www.britannica.com/topic/Chinese-Exclusion-Act.

[15] Robert S. Chang, "Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases," *Case Western Reserve Law Review* 68 (2018 2017): 1183. According to Chang, "Though

Johnson Reed Act in response to a xenophobic shift in American consciousness after the First World War and the Russian Revolution. During this time, there was a considerable fear of foreign radicalism "invading" the United States.[16] Growing distrust and anger was aimed frequently at Eastern European populations, particularly Jewish immigrants. Additionally, Social Darwinism, the idea that populations are subject to laws of natural selection, and eugenics, the outdated practice of the hereditary selection of "desirable" traits, flourished and were embraced by influential statesmen. Alan Kraut, a professor of American history at the University of Washington, D.C., told *Smithsonian Magazine* that, at the time, "eugenics was something that very bright, intelligent people talked about in the same way that we talk [today] about genetic engineering." [17] With respect to eugenics, the 1924 Immigration Act, according to one of the most prominent twentieth-century eugenicists, Harry Laughlin, was to "optimize" the traits of immigrants entering the United States and transform how Americans perceived immigrants. Laughlin said:

> "The immigrant to the United States was to be looked upon, not as a source of cheap or competitive labor, nor as one seeking asylum from foreign oppression, nor as a migrant hunting a less strenuous life, but as a parent of future-born American citizens. This mean that the hereditary stuff out of which future immigrants were made would have to be compatible racially with American ideals.'[18]

Morover, just ten years before the Johnson-Reed Act, the U.S. experienced its highest level of immigration to date, contributing to the nativist ferment of the early twentieth century. In

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[Trump's] government attorneys do not cite or directly rely upon the *Chinese Exlucion Case* or *Korematsu v. United States*, these cases directly underlie their arguments, providing perhaps the strongest precedential authority for his actions".

[16] Madeline Hsu, "Emergency Quota Law (1921)," Immigration History, *Emergency Quota Law (1921)* (blog), accessed April 10, 2020, https://immigrationhistory.org/item/1921-emergency-quota-law/.

[17] Lorraine Boissoneault, "Literacy Tests and Asian Exclusion Were the Hallmarks of the 1917 Immigration Act," Smithsonian Magazine, accessed April 10, 2020, https://www.smithsonianmag.com/history/how-america-grappled-immigration-100-years-ago-180962058/.

[18] Harry H. Laughlin, Analysis of America's Modern Melting Pot: Hearings before the Committee on Immigration and Naturalization, House of Representatives, November 21, 1922 (Washington, DC: Government Printing Office, 1923), 731, 757.

1907, 1.3 million immigrants passed through Ellis Island, attracted to the United States because of the industrial boom and the promise of factory work.[19] Many of the immigrants who entered found jobs in the industrial economy in the north, making up the majority of waged workers in Pennsylvania coal fields, Chicago stockyards, and New York garment factories.

Immigration plummeted in the wake of 1924. The graph, figure 1.3, from the World Economic Forum, demonstrates the sharp decline of immigration to the U.S. of nearly 84 percent. Furthermore, figure 1.2, a political cartoon from 1921, depicts what immigration with the restrictive quotes put in place felt like to the both the American population and European immigrants attempting to enter the United States. Like the political cartoon depicts, the 3% quota on European immigration, made the process of entering the United States akin to squeezing through a funnel.[20]

Immigration policy did not drastically change again until the 1965 Harts Cellar Act, also known as the Immigration and Nationality Act of 1965, which is now the basis of modern immigration policy today. The Immigration and Nationality Act of 1965 (INA) signaled a relaxation of immigration controls after decades of restrictive quotas. The postwar period and the gains of the Civil Rights Movement provoked President Lyndon B. Johnson and Congress to revisit the discriminatory immigration laws of the past.[21] Supporters viewed the act as a historical correction to the nation's racist immigration policies and an extension of the civil rights movement during the 1960s. Congressional representative Robert Sweeney (D-Ohio) during the time said:

> "Mr. Chairman, I would consider the amendments to the Immigration and Nationality Act to be as important as the landmark legislation of this

[19] Boissoneault, "Literacy Tests and Asian Exclusion Were the Hallmarks of the 1917 Immigration Act."
[20] See Appendix A
[21] David Weissbrody, Laura Danielson, Howard S. Myers, *Immigration Law and Procedure in a Nutshell*, 7th ed. (West Academic Publishing, 2017).

> Congress relating to the Civil Rights Act. The central purpose of the administration's immigration bill is to once again undo discrimination and to revise the standards by which we choose potential Americans in order to be fairer to them and which will certainly be more beneficial to us."[22]

Although the INA was well-intentioned, the federal government did not anticipate the sudden spike in immigration to the United States and the backlog it would create. The 1965 INA eradicated the quota laws of the Johnson-Reed Act and implemented a new priority-based system. The system of preferences included seventy-five percent of immigration reserved for family reunification, twenty percent for employment and five percent for refugees. Each country received an annual cap of 20,000 per year, which also included countries in Latin America and the Caribbean.[23] For the first time, immigration truly opened up for non-European populations. However, according to historian Mae Ngai, the law was not truly inclusive towards.[24] Ngai noted that the law prioritized legal citizenship for high-skilled workers, but left many unskilled workers in sectors like agriculture and construction unable to gain citizenship or work authorization in the United States, contributing to an increase in undocumented immigration.

The annual cap the INA placed on legal immigration from all countries including those from Latin America in addition to the end of the Bracero Program, created the conditions for the prevalence of unauthorized immigration from Latin America prevalent today. The Bracero Program was a bilateral-contract labor program between the U.S. and Mexico that provided American farmers and other industries that suffered from labor shortages after World War II with Mexican laborers through short-term labor contracts to work in the U.S.[25]

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[22] Congressional Record, August, 25, 1965, p. 21765
[23] Madeline Hsu, "Immigration and Nationality Act of 1965 (Hart-Celler Act)," *Immigration History* (blog), accessed April 10, 2020, https://immigrationhistory.org/item/hart-celler-act/.
[24] Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, Updated (United States: Princeton University Press, 2014).
[25] Center for History and New Media, "About," Bracero History Archive, accessed April 12, 2020, http://braceroarchive.org/about.

Two consequences of the program were an increase in both legal and illegal Mexican workers and greater dependency on the high-intensity, cheap labor.[26] In theory, Mexico and the United States put in place safeguards to ensure that American farmers did not take advantage of Mexican laborers and that only U.S. businesses facing labor shortages received Bracero workers. However, in practice, these aims did not come to fruition.[27] After 12 years and the gradual increase of fraud and mistreatment of workers, U.S. and Mexico decided to end the program.[28] Although well-intentioned, the end of the program had greater consequences than both the U.S. and Mexican government expected. Mexican immigration and American demand for cheap labor from Mexico did not stop even though the bi-lateral agreement had been eradicated. During the years of the Bracero Program, the amount of removals and returns of undocumented immigrants plummeted, but after its termination the amount of removals sky rocketed (see figure 1.4). The cessation of the program did not end temporary worker migration into the United States, it criminalized it.[29] Overall, the 1965 INA was an achievement of the civil rights era. But, in conjunction with the end of the Bracero program and the introduction of universal immigration caps, it led to an increase in unauthorized immigration from Latin America and the beginning of new immigration struggles.

The next significant immigration policy change came at the heels of the terrorist attacks of September 11, 2001. According to the Migration Policy Institute, an independent, nonpartisan, nonprofit think tank dedicated to the study of the movement of people, "the post-9/11 era has witnessed the emergence of an immigration system in the United States dominated by national

[26] Alex Nowrasteh, "Enforcement Didn't End Unlawful Immigration in 1950s, More Visas Did," *Cato Institute* (blog), November 11, 2015, https://www.cato.org/blog/enforcement-didnt-end-unlawful-immigration-1950s-more-visas-did.
[27] Center for History and New Media, "About."
[28] Center for History and New Media.
[29] See appendix A

security and enforcement consideration[s]." The 9/11 attackers entered the United States on travel visas, which stoked nativist backlash and renewed contentious debates over immigration law. As a consequence, the Bush administration's actions after 9/11 are a reflection of what Roxane Cohen Silver calls a "shattered sense of security and perceptions of invulnerability among resident of the United States and the Western world."[30]

To make immigration more focused on enforcement and defense, President George W. Bush signed the 2002 Homeland Security Act, ushering the most significant reorganization of the Defense Department since the Second World War. In an effort to streamline and make immigration processes more efficient, the legislation created the Department of Homeland Security (DHS), which brought 22 federal agencies under one roof. The goals of the new department were to create a "zone of security" beyond US borders, enforce immigration laws to a larger extent, and deny immigration benefits to "dangerous individuals."[31] Many of the functions of the US Immigration and Naturalizations Service (INS)—previously a bureau of the US Department of Justice (DOJ)—were divided into three smaller departments under the jurisdiction of DHS: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and Citizenship and Immigration Services (USCIS). [32] Today, CBP enforces immigration and customs law at ports of entry and between ports of entry. ICE assumed the investigative functions of INS and Customs Service, INS detention and removal functions and all of its intelligence operations. Finally, USCIS oversees legal immigration, including work permits and visas into the United States.

[30] Roxane Cohen Silver, "An Introduction to '9/11: Ten Years Later'.," *American Psychologist* 66, no. 6 (2011): 427–28, https://doi.org/10.1037/a0024804.
[31] Nowrasteh, "Enforcement Didn't End Unlawful Immigration in 1950s, More Visas Did," 11.
[32] David Weissbrody, Laura Danielson, Howard S. Myers, *Immigration Law and Procedure in a Nutshell*.

One of the major policy goals and consequences of the creation of DHS was an increase in border enforcement, particularly at the southwest border.[33] Through billions of dollars in manpower, infrastructure, and equipment, DHS has implemented many border security initiatives that include unmanned drones patrolling border regions to motion sensors made to detect the movement of illegal crossing at the border. Before the initiative was called off in January 2011 because of project costs and technical problems, the U.S. government invested$30 billion into a technology known as SBInet or the "virtual fence." It was supposed to provide high-tech surveillance of the border through motion-detector sensors, remotely operated cameras and unmanned vehicles.[34] Even though the "virtual border" was never completed, the project reflects the vast investment the federal government has directed toward immigration border protection since 9/11. Figure 1.5 demonstrates the steady increase of the CBP budget since it began operations in 2004.[35]

Additionally, the post-9/11 era has introduced a new generation of intelligence and law enforcement initiatives that have altered the way immigration enforcement operates on a local, state and federal level. Through the implementation of interoperable databases and systems, post-9/11 immigration practices have blurred the lines between federal and local immigration enforcement. For example, a statute from the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, 287[g], gained significant funding following the attacks. Through the statute, the federal government can delegate immigration enforcement powers to state and local officers, allowing local and state officers to engage in immigration screenings during their field policing

[33] Michelle Mittelstadt et al., "Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11" (Migration Policy Institute, August 2011).
[34] "Why SBINet Has Failed | Homeland Security Newswire," accessed April 12, 2020, http://www.homelandsecuritynewswire.com/why-sbinet-has-failed.
[35] See Appendix A

operations. Thus, if law enforcement officials detain a suspect for a traffic violation, they have the legal jurisdiction to also arrest the suspect for immigration violations as well. The goal of Section 287[g] is to target "dangerous criminals." However in 2010, the Migrant Policy Institute found that roughly half of those arrested through the statute were noncitizens arrested for misdemeanors or traffic violations.[36] Moreover, programs like Secure Communities—a partnership that began in 2008 that allows for ICE and other federal agencies like the Federal Bureau of Investigation (FBI) to share information with one another and local and state entities—further entangle federal, state, and local immigration operations. With information that ICE gains through the partnership, it can proceed in the way it deems necessary depending on the prioritization of the individual's removal. In most cases, ICE will prioritize most high-risk cases that present the most significant threats such as those with a significant criminal history.

The 1924 Johnson-Reed Act, the 1965 Immigration and Nationality Act, and the 2002 Department of Homeland Security Act are the result of a change in the way the U.S. perceived immigration—at times welcoming it and at others tightening borders.

Asylum in the United States

Asylum policies in the U.S. also reflect the dualism that underlies the ideology of immigration in America. Historically, the U.S. has been slow to enact policy that grants asylum seekers legal entry into the United States. In 1948, in the wake of World War II, the UN ratified the Universal Declaration of Human Rights, which contained Article 14 guaranteeing that "everyone has the right to seek and to enjoy in other countries asylum from persecution."[37] The declaration sought to universally protect human rights for the first time and promoted legal

[36] Mittelstadt et al., "Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11," 11.
[37] "Universal Declaration of Human Rights," October 6, 2015. https://www.un.org/en/universal-declaration-human-rights/index.html.

protections for refugees.[38] The 1951 Convention Relating to the Status of Refugees established the definition of a refugee as someone who has a "well-founded fear of persecution in their home country because of their race, religion nationality, membership of a particular social group or political opinion, is outside his or her country of nationality, and is unable to receive protection from their country, and or return to their country for the fear of persecution (see Article 1A(s))."[39] The 1951 Convention outlined a number of rights granted to refugees through international law, but the cornerstone was the principle of non-refoulment from Article 33.[40] Non-refoulment protects refugees from being sent back to a country where they fear persecution and or threats to their life. In 1967, the 1951 Convention was amended to broaden its geographical and time limits (previously only applied to those fleeing Europe before January 1, 1951) to be applicable globally and in perpetuity.

The Immigration and Nationality Act of 1952 gave the U.S. Attorney General power to grant asylum to migrants unable or unwilling to return to their countries in accordance with the 1951 Refugee Act. However, legislation governing asylum before the 1980s usually applied only to migrants who served the national interest. For example, from the Cold War era until the mid-1990s, the large majority of refugees resettled in the United States were those fleeing the former Soviet Union and Southeast Asia. The U.S. supported sheltering populations who were fleeing communist regimes. Some of the policies enacted during this time included the 1959 Cuban Refugee Act, in which the U.S. opened its borders to people feeling the violence of the Cuban Revolution and the subsequent rise of Fidel Castro. Between 1961 and 1962, approximately

[38] "Asylum & the Rights of Refugees | International Justice Resource Center." Accessed December 3, 2019. https://ijrcenter.org/refugee-law/.
[39] United Nations High Commissioner for Refugees, "1951 Convention and Protocol Relating to the Status of Refugees and Stateless Persons," UNHCR, accessed December 11, 2019, https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html.
[40] UN High Commissioner for Refugees, "The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol" (Switzerland: UNHCR, September 2011).

60,000 Cubans entered under the program and were processed through a specially opened INS processing center in Miami, Florida.

In 1980, the U.S. finally acceded to the 1951 Convention and its 1967 Protocol through the 1980s Refugee Act. Although the Refugee Act did not terminate the biased admission of certain asylum seekers, the law broadened eligibility and created a formal asylum system. Indeed, it expanded the definition of refugees in accordance with the 1951 Convention, created the precedent for presidents in consultation with Congress to set the number of refugees to be admitted into the United States each year and established explicit procedures on how to process and absorb asylum and refugee seekers into the United States.

How to Apply for Asylum

The process differs for applying for asylum or refugee status. Asylum applicants are those already residing in the U.S. or at the border. Refugees are screened overseas then granted or denied refugee status in the United States.

Applying for asylum requires a formal adjudication process. There are two types of asylum: affirmative asylum and defensive asylum. Affirmative asylum applies to those individuals not apprehended at the border or near the border by CBP. Those applying for affirmative asylum have entered the U.S. either with a visa, such as a travel visa, crossed the southwest or northern border without being apprehended, or are an unaccompanied child protected under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).[41] Only if the applicant has not previously appeared before an immigration judge (IJ) or Board of Immigration Appeals (BIA), the first step in applying for asylum if filling out the I-589

[41] "Trafficking Victims Protection Reauthorization Act Safeguards Children," National Immigration Forum, *Trafficking Victims Protection Reauthorization Act Safeguard Children* (blog), May 23, 2018, https://immigrationforum.org/article/trafficking-victims-protection-reauthorization-act-safeguards-children/.

application within a year of arriving to the United States. Once USCIS has received and approved the application, the asylum seeker will receive notice for an interview with an asylum officer at one of eight asylum offices, two asylum sub-offices, or at a USCIS field office. If the asylum officer finds that the asylum seeker demonstrates "credible fear" and would be harmed being returned home, they are granted asylum. Once granted asylum, the U.S. gives asylees the opportunity to apply for an employment authorization document (EAD), Social Security card, green card for permanent residence and immigration benefits for spouses and unmarried children under the age of 21. However, if the asylum application is denied, the asylum seeker will be referred to an Immigration Judge for removal proceedings.

The defensive asylum process, while similar to that of affirmative asylum, involves other organizations outside of the USCIS, including ICE, CBP and the Executive Office of Immigration Review (EOIR), a department under the DOJ in charge of immigration court proceedings. Those placed in defensive asylum system include migrants who have arrived at a port of entry and requested asylum or those caught between ports of entry or within 100 miles of the border by CBP. Once they are apprehended, migrants are automatically put into expedited removal proceedings. Until recently, Customs and Border Patrol could only kept apprehended asylum seekers in their custody for 48 hours before turning them over to ICE custody. ICE would then place them in one of their fifteen detention facilities as they awaited their credible fear interview.

Like the affirmative asylum process, asylum officers determine the validity of asylum seekers claims in a credible fear interview. According to the 1951 Convention, only the five following characteristics constitute credible fear: persecution based on race, religion, nationality, political opinion or belief, or membership (formal or informal) in a group. If an asylum officer

denies the CFI, the asylum seeker has two options: accept the denial and begin the deportation process or appeal the denial to be seen before an IJ. In an appeal of a CFI denial, the IJ reviews the case and makes a final decision on the legitimacy of the asylum seekers credible fear. If denied once again, ICE deports the asylum seeker. However, if the IJ does find credible fear, EOIR presents the asylum seeker with a notice to appear (NTA), formally beginning the removal proceedings.

Likewise, if an asylum officer decides the asylum seeker has credible fear, the EOIR presents them with an NTA. In most cases, the asylum seekers attend a hearing called the master calendar hearing (MCH), where the IJ informs them of their legal rights followed by usually a query whether they understood. At this time, the respondent can request the judge for more time to seek counsel or prepare an application for relief through a plead for a continuance order. After the MCH, if the respondent has completed an application for relief, such as an adjustment of status, cancellation of removal, or application for asylum, they proceed to their individual merits hearing. In the Individual Merits hearings, the asylum seeker presents their case before the IJ. If the IJ approves the request for asylum, the immigrant is allowed into the United States legally and after several years may apply for permanent residence in the United States. If the IJ denies asylum, the respondent must begin the deportation process again. However, once again, the asylum seeker can appeal the asylum denial and begin the appeal process. However, if the appeal is denied yet again, the asylum seeker faces deportation.

Additionally, at any point during the court proceedings, the respondent can request voluntary departure, a discretionary benefit where the respondent must voluntarily leave the United States. However, the individual will not be subject to certain statutory bars from reentering the United States that accompany the removal order.

Issues at Hand: Evolution towards Exclusionary Deterrence-Based Asylum Policies and The Rise of Video Teleconferencing in the Era of Trump

This section first explores the practice of deterrence-based asylum policies from past decades and how President Trump has taken those a step further and changed who is eligible for asylum. I describe Trump's asylum policies as "exclusionary deterrence-based policies." Then, I delve into an in-depth look at Migrant Protection Protocols (MPP), arguably the most drastic change and immediate threat to the asylum system today. Finally, this section concludes with a brief introduction to video teleconferencing and its history in immigration courts.

The Trump Administration is waging war against asylum. [42] Since the passage of the 1980 Immigration and Refugee act, an administration has never attempted to prevent asylees and refugees entering the United States like the Trump administration today.[43] Previous administrations have used deterrence-based policies since the 1990s. The goal of these policies was to impose a new rule or practice that made receiving asylum or physically crossing into the U.S. more difficult. In theory, increasing the barrier to entry would discourage people from journeying to the U.S. to seek asylum or enter illegally. Trump administration policies also attempt to dissuade people from travelling to the U.S. However, under Trump, the U.S. government has taken the further step of attempting to circumscribe migrants' rights to apply for asylum altogether by passing a series of new policies such as preventing barring migrants from asylum if they passed through a third country before reaching the United States.[44] Given that the

[42] In all 4 interviews conducted with immigration attorneys along with off the record conversations had with co-workers at a non-profit that provided legal assistance to immigrants in Texas, people considered the current immigration policies as attacks on asylum. Furthermore, Immigration Justice Campaign webinars described Trump's actions as "War on Asylum"

[43] Interviewee #1, interviewed by the author, Austin, Texas, February, 29, 2020.

[44] Peniel Ibe, "Trump's Attacks on the Legal Immigration System Explained," *American Friends Service Committee*, April 23, 2020, https://www.afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained.

United States has experienced an unprecedented surge of asylum-seekers and a huge backlog of immigration court cases, past deterrence-based policies and new exclusionary tactics have not achieved their goal of either lowering the amount of people seeking asylum or lightening the load of cases burdening the immigration courts.[45]

Historically, deterrence-based immigration policies enacted since the mid-twentieth century have led to dangerous conditions for migrants attempting to reach the border and for undocumented immigrants in the United States. For example, President Bush passed the Secure Fence Act of 2006, which militarized the border and led to the construction of seven hundred miles of border wall. The intention of the wall was to create a physical barriers in places where the environment was not a natural barrier to entry. In theory, the Bush Administration intended for the wall to decrease the number of illegal entries into the U.S by both physically preventing entries and deterring migration to the U.S., but, in practice, the erection of the wall accomplished neither of those goals. In fact, it pushed migrants to attempt to cross the border at more remote and dangerous areas. Between 2006 to 2012, the death rate of migrants grew 212 percent, which closely matched the 218 percent growth of the border fence.[46] Before the Bush administration passed the Secure Fence, a report from the Government Accountability Office in 2001 alerted him of the potential adverse effects. The report found that "migrants have always faced danger

[45] "Mapping Where Immigrants Reside While Waiting For Their Immigration Court Hearing," Immigration Details (Transactional Records Access Clearinghouse, March 24, 2020), https://trac.syr.edu/immigration/reports/600/. "Just under 100,000 cases were added to the Immigration Court's backlog since the beginning of FY 2020. A total of 1,122,824 cases are now pending on the court's active docket as of the end of February 2020. This is up from 542,411 cases when President Trump assumed office. When 320,173 inactive pending cases are included, the court's current backlog now tops 1.4 million cases."

[46] David Bier, "Fences Made Crossings Deadlier—Asylum Made Them Much Less So," *Cato Institute* (blog), January 24, 2019, https://www.cato.org/blog/fences-made-crossings-deadlier-asylum-made-them-much-less-so.

crossing the border and many died before INS began its strategy [from secure fence act, but] the strategy has resulted in an increase in deaths from exposure to either heat or cold." [47]

Trump has taken these deterrence-based immigration practices one step further by implementing policies that deny asylum before asylum seekers even reach the U.S. border, or as I call them, exclusionary deterrence based policies.[48] During the Summer of 2019, the Trump Administration implemented the Asylum Cooperation Agreements (ACAs), a exclusionary deterrence based policy that specifically targeted Latin American migrants. ACAs or as non-profits colloquially call them, "Unsafe Country Agreements," are third-country agreements that allow the U.S. to return anyone seeking asylum in the U.S. who has passed through the Northern Triangle (Guatemala, El Salvador and Honduras) to one of those countries. [49] The agreements assume that Guatemala, El Salvador and Honduras are stable enough and have adequate asylum protocols to accept, process and care for these refugees. However, to this day, U.S. receives a large portion of asylum seekers from the countries in the ACA agreements. In July 2019, detainees with citizenships from the Northern Triangle made up almost half the population in detention centers.[50] The ACAs directly target Latin Americans and refugees traveling through Central America to reach the U.S. Moreover, the agreements also stipulate that migrants that do not seek asylum in one of the ACAs prior to seeking asylum in the U.S., legally cannot apply for asylum in the U.S. If they request, they can apply for a lesser form of protection that provides no means of permanent residence or citizenship.

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[47] United States General Accounting Office, *INS' SOUTHWEST BORDER STRATEGY Resource and Impact Issues Remain After Seven Years*, 1-37, accessed April 1, 2020, https://www.gao.gov/assets/240/231964.pdf.
[48] Anita Kumar, "After Delays, Trump on Track to Build More than 450 Miles of Border Wall," *POLITICO*, February 14, 2020, sec. White House, https://www.politico.com/news/2020/02/14/trump-450-miles-border-wall-115339.
[49] Immigration Justice Campaign. "The War on Asylum." Webinar. March 31st, 2020.
[50] "Immigration and Customs Enforcement Detention," Detention (Transactional Records Access Clearinghouse), accessed May 3, 2020, https://trac.syr.edu/phptools/immigration/detention/. According to the data from July 2019, the citizenship of detainees was 22% Hondurian, 15% El Salvadorian, and 10% Guatemalan.

Heart of the War: Migrant Protection Protocols

Another exclusionary deterrence program that has most drastically changed the asylum system is Migrant Protection Protocols (MPP) or otherwise known as "Remain in Mexico."[51] MPP has upended the asylum system leaving migrants, advocates, and even DHS personnel struggling to navigate an unprecedented operation with little oversight and direction.[52] Department of Homeland Security announced Remain in Mexico on January 24, 2019. The program returns any migrant seeking asylum at the southwest border (except for unaccompanied minors and those in expedited removal proceedings released on bond or parole) to await their immigration court hearings in Mexico instead of in the U.S. Since its implementation, the United States has sent over 60,000 asylum seekers back to Mexico, and the number continues growing today.[53] DHS describes MPP as a novel and safe improvement to the immigration system. However, the American Bar Association (ABA), the largest voluntary association of lawyers and legal professionals in the world, has expressed "deep concerns" that MPP "discriminates against Spanish-speaking asylum seekers and deprive[s] them of full and fair access to the American justice system."[54]

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[51] "A Timeline Of The Trump Administration's Efforts to End Asylum," National Immigrant Justice Center, accessed April 1, 2020, https://www.immigrantjustice.org/issues/asylum-seekers-refugees.

[52] Immigration Justice Campaign. "The War on Asylum." Webinar. March 31st, 2020.

[53] Immigration Justice Campaign Webinar with keynote speakers including Jocelyn Dyer: Counsel, Pro Bono Programs, Immigration Justice Campaign; Jennie Guilfoyle: Senior Training Attorney, Immigration Justice Campaign; Laura Peña: Pro Bono Counsel, ABA Commission on Immigration; and Jennie Kneedler: Staff Attorney, ABA Commission on Immigration

[54] SUBCOMMITTEE ON BORDER SECURITY, FACILITATION, AND OPERATIONS COMMITTEE ON HOMELAND SECURITY UNITED STATES HOUSE OF REPRESENTATIVES for the hearing on "Examining the Human Rights and Legal Implications of DHS' 'Remain in Mexico' Policy". p1; "Migrant Protection Protocols," Department of Homeland Security, January 24, 2019, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. The press release from DHS described MPP as a program that would "as a program that would "restore a safe and orderly immigration process, [and] decrease the number of those taking advantage of the immigration system…while ensuring that vulnerable populations receive the protections they need."

There is a dangerous disparity between the way the Trump administration frames the successes and benefits of MPP and the reality of the program on the ground. The MPP press release describes the implementation of the Remain in Mexico program as a positive change that would lighten immigration court loads, prevent migrants awaiting their court hearing from "disappearing" in the United States, and decrease the amount of human smuggling and trafficking that occurs during the dangerous journey to the U.S., all while maintaining safety and due process for asylum seekers.[55] According to a memo released by the secretary of DHS, Mexico must provide the following conditions for asylum seekers issued a notice to appear (NTA) and sent back to Mexico:[56]

1. Authorization for the temporary entrance of foreign individuals
2. "Equal treatment with no discrimination whatsoever and due respect to their human rights"
3. The opportunity to apply for work permit and work
4. Arrangements that ensure migrants are able to attend their court hearings

Nearly a year since the launch of the program, the reality on the ground does not measure up to the benefits DHS has touted, nor has the United States or Mexico complied with their legal obligations to asylum seekers currently in the program. As of April 2020, the

[55] "Migrant Protection Protocols," Department of Homeland Security, January 24, 2019, https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. Note on migrants disappearing into the U.S.—The claim that MPP would prevent migrants awaiting their asylum claim from disappearing in the United States before their hearing date is not a strong point/argument for the justification of MPP. The Trump administration already made it virtually impossible for asylum seekers, other than unaccompanied minors or vulnerable people such as pregnant women, to wait for their immigration hearing with family or acquaintance in the United States. Since 2016, Immigration judges under the attorney general rarely issue parole, and if they do issue a bond for release the price is usually too high for an asylum seeker to pay. This was verified by interview 1 and 3 and personal experience in court proceeding with a Texas Judge.

[56] Kirsjen Nielsen M., "Policy Guidance for Implementation of the Migrant Protection Protocols," Memorandum, January 25, 2019, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

San Diego, El Paso, Calexico, Laredo, Eagle Pass, and Brownsville port of entries and immigration courts put in place the Migrant Protection Protocols. The pictures in figure 1.6, courtesy of Katie Shepard, a member of the National Advocacy Counsel and American Immigration Council, demonstrate the "towns" that have sprouted up in Matamoros, Mexico, Brownsville's counterpart.[57] Immigration advocates have recounted the squalid conditions at the border tent towns where occupants lack basic human necessities like water, food, and proper shelter.[58] Individuals living in these tent towns near ports of entry are regularly kidnapped, raped, and beaten by organized crime on the Mexican side of the border.[59] Figure 1.7, a map released by the U.S. State Department's travel advisory, shows that the U.S. qualifies one-third of the ports of entry with MPP in place as Level 4, "no travel zones."[60] The United States uses the Level 4 no travel zone classification for war stricken areas like Syria and Iraq. The State Department describes Matamoros and Nuevo Laredo in the Tamaulipas state as a place with "organized crime activity – including gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault," where

> "criminal groups target public and private passenger buses as well as private automobiles traveling through Tamaulipas, often taking passengers hostage and demanding ransom payments. Heavily armed members of criminal groups often patrol areas of the state in marked and unmarked vehicles and operate with impunity particularly along the border region from Reynosa northwest to Nuevo Laredo. In these areas, local law enforcement has limited capability to respond to crime incidents." [61]

[57] See Appendix A
[58] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases," MPP (Transactional Records Access Clearinghouse, December 19, 2019), https://trac.syr.edu/immigration/reports/587/.
[59] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases."
[60] See Appendix A
[61] U.S. Department of State, "Mexico Travel Advisory," Mexico Travel Advisory, December 17, 2019, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

Validating the warnings issued by the U.S. State Department, speakers from the Immigration Justice Campaign webinar series recounted their experience at the border in November 2019:

> "I have been down to the border twice and talked to the asylum seekers themselves and they have indicated they are the victims of organized crimes and regularly get kidnapped by cartels in Mexico because they are so vulnerable in these areas...The last time I was there, it was 36 and raining and these people were trying to get their tents not to sink into the mud. There hundreds of children and infants living there." [62]

In February 2020, nearly 2,500 migrants lived in a small tent town near Matamoros, Mexico, cooking on stoves made out of old washing machines, with little to no access to health care and or lawyers to help with their cases.[63] According to TRAC, a nonpartisan, nonprofit data research center, MPP has contributed to longer wait times for first hearings. In December 2019, 39 percent of immigrants in the MPP program were still waiting to have their Master Calendar Hearing compared to 36 percent of those who were allowed into the United States.[64] Individuals in MPP also suffer from lack of income as they wait weeks to months for their hearings. Many times, individuals' do not possess proper documentation after being returned to Mexico, rendering them legally unemployable. Consequently, their lack of documentation prevents them from improving their living standard at the border. Remain in Mexico puts individuals in a "Migrant Limbo."[65]

Another problem associated with MPP is the lack of transparency and clarity for asylum seekers. In an article published by the *Atlantic* in September, 2019, immigration writer, J. Weston Phippen described the experience of a Cuban migrant, Dana, in the MPP program. Like many other migrants who reached the U.S. border and were sent back to Mexico, Dana was left

[62] Immigration Justice Campaign Webinar. "War Against Asylum."
[63] Zolan Kanno-Youngs, "'He Turned Purple': U.S. Overlooks Ill Asylum Seekers," *The New York Times*, February 22, 2020, sec. U.S., https://www.nytimes.com/2020/02/22/us/politics/trump-asylum-remain-in-mexico.html.
[64] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases."
[65] J. Weston Phippen, "Trapped in Juárez: Life in the Migrant Limbo," The Atlantic, September 16, 2019, https://www.theatlantic.com/international/archive/2019/09/us-mexico-mpp-ciudad-juarez/597796/.

confused. Having her Cuban paperwork, she luckily found a job waiting tables for $10 a day. When she received her notice to appear (NTA) after she first reached the port of entry, she did not understand she was placed in MPP. She believed that the date CBP told her to return to the port of entry would be the date she would be allowed into the United States, not her first hearing in front of an immigration judge. She did not fundamentally understand what it meant to be placed in MPP and how to navigate the asylum process she now found herself in. That is not uncommon.

Using data published by TRAC, I found that 50 percent of all individuals placed in MPP were not present at their last hearing, automatically closing their case with an *in absentia* decision.[66] That pales in comparison to the 89 percent of immigrants that ICE released into the United States who attended every court hearing. This discrepancy between the amount of migrants in MPP and those released in the U.S. who attend their hearings, relates to the fact that after migrants reach the port of entry and the Immigration Court issues them an NTA, Immigration Courts have no way to notify migrants in about any change in date, time, and location of their hearings. The information that does reach migrants in MPP often lacks thorough and clear information about how and where to cross the U.S. border to attend their hearing. [67]

Making the situation worse, over ninety-three percent of individuals sent back to Mexico never speak with a legal advisors or immigration attorney to assist them I navigating the asylum system.[68] TRAC found that asylum seekers in the U.S. are seven times more likely to have an attorney than those placed in MPP. [69] Chances of being granted asylum with an attorney are low

[66] "Details on MPP (Remain in Mexico) Deportation Proceedings," accessed February 26, 2020, https://trac.syr.edu/phptools/immigration/mpp/.
[67] Kanno-Youngs, "'He Turned Purple.'"
[68] "Details on MPP (Remain in Mexico) Deportation Proceedings." As of March 2020, 64,934 people have been placed in MPP and only 3,993 have been represented.
[69] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases."

and almost abysmal without one.[70] The reason many individuals in MPP lack representation is not because advocates do not want to help, but that legally they cannot practice in Mexico. Immigration attorneys today are presented with a difficult situation—desire to help but an inability to physically reach that population.[71]

On top of the drastic change ushered by MPP, DHS opened two huge tent court facilities in Brownsville and Laredo to fast track MPP cases through the use of video teleconferencing. The tent courts function as virtual immigration court rooms for Remain in Mexico cases. During hearings, asylum seekers are held in tents at a port of entry while the judges, government attorneys and translators appear remotely via video teleconferencing in a traditional brick and mortar courtroom somewhere else. Because tent court facilities are on a port of entry, Customs and Border Patrol has full control of the facilities.[72] If a migrant is a part of the seven percent with an attorney, MPP makes it difficult for the attorneys to actually have access to them because CBP and ICE have full jurisdiction over when attorneys can visit with their client.[73] As a consequence, there is a total lack of legal orientation programs traditionally available to individuals entering the asylum process. Port courts have also been known to give out inaccurate or incomplete court documents that provide fake hearings and dates further confusing asylum seekers. [74] The largest issue with port courts, however, is the level of secrecy in which they operate. In December 2019, only one NGO had been allowed into the port court facility and that was before they were operating. Currently, DHS does not permit attorney observers into the facility, even though immigration hearings are public hearings.[75]

[70] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases."
[71] Interviewee #1, interviewed by the author, Austin, Texas, February, 29, 2020.
[72] Immigration Justice Campaign. "The War on Asylum." Webinar. March 31st, 2020.
[73] Ibid.
[74] Ibid.
[75] Immigration Justice Campaign. "Latest Developments in the War on Asylum." Webinar. March 31st, 2020.

Video Teleconferencing in Immigration Court Proceedings

While DHS' use of VTC for all MPP cases is alarming, the use of VTC in immigration court proceedings dates back almost 20 years to the Bush administration. In general, video teleconferencing began to appear in courts during the late 20th century for aspects of the criminal trial process such as arraignments, bail, sentencing and post-conviction hearings. An Illinois court was the first to conduct bail hearing over video in 1972.[76] Florida courts followed suit to use videoconferencing for misdemeanors, and a Philadelphia court used video technology for preliminary arraignments.[77] VTC eventually made its way into immigration court proceedings as a technological trial in Chicago, Illinois, with immigrants held at the Federal Bureau of Prisons. In 1996, Congress approved the use of using televideo technology in all immigration proceedings. Between 1996 to 2007, the EOIR did not collect consistent data on which courts used VTC and in what capacity.[78] It was not clear how quickly courts implemented VTC technology, what aspect of the immigration portion they used it for, and how successful its use was in hearings. However, after 2007, the EOIR made data about VTC including the adjudication medium public record. The data clearly shows a steady increase from 2007 to 2012.[79]

Since the tenure of former Attorney General Jeff Sessions, the use of VTC in immigration hearings has skyrocketed. In a joint attempt by Department of Homeland Security and Executive Office of Immigration Review[80] to lower the backlog of cases plaguing the immigration courts, they implemented the "Strategic Caseload Reduction Plan." In the plan,

[76] Haas, "Videoconferencing in Immigration Proceedings."
[77] Haas.
[78] Ingrid Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 108, no. 4 (2015): 933–1019.
[79] Eagly.
[80] a sub-committee of the DOJ whose role is to conduct removal proceedings in immigration courts

EOIR outlined five initiatives they indented on implementing and reaping the benefits of by 2020. Initiatives included restricting Immigration Judges (IJ) ability to use administrative closure,[81] case quotas for IJs,[82] a reduction of continuances, a streamlined IJ hiring process and an increase in the use of VTC. The plan intended to "expand VTC's adjudicatory capacity through the implementation of a pilot program of remote immigration adjudication centers. As of December 2019, a total of 15 judges sit in the adjudication centers located in Falls Church, Virginia, and Fort Worth, Texas. Since the initial implementation of VTC, the EOIR views VTC as a mechanism to "maximize EOIR's current adjudicatory capacity, and thus help reduce the pending caseload by increasing productivity."

Methodology

To analyze the impact of video teleconferencing on immigration court proceedings in 2020, I aimed to replicate the qualitative research completed by Ingrid Eagly in 2015. To do so, I conducted interviews with immigration attorneys and other individuals such as law students who have represented asylum seekers. Through the interviews, I aimed to understand the lived experiences of attorneys, experts, and migrants in immigration court and their opinions on the use of VTC under President Trump's administration. All participants were contacted through email or phone asking them to participate in a voluntary interview. After gaining verbal consent, all of the interviews were conducted via phone and followed a structured set of questions but depending on the interviewee's experience and knowledge, I asked additional questions. [83] Each interview lasted no more than 40 minutes. To further understand the nuances of the U.S.

[81] Administrative closure was a common way for judges to manage their docket.
[82] The Plan called for caseload management benchmarks and goals. IJs had to complete 700 removal cases in 1 year or they risk losing their job. The National Association of Immigration Judges previously prohibited the use of quotas, but the DOJ and EOIR overruled them.
[83] View Appendix A.

immigration system, I worked as an intern for a non-profit that provided low-to-no-cost legal services to immigrant families in Texas. Through my internship, I observed an individual merits hearing conducted via VTC and visited the Hutto detention center located outside of Austin, Texas, several times. Although I have limited experience in immigration compared to other legal professionals, those few experiences helped me get hands on experience with the immigration in the United States and understand the gravity and importance of a well-functioning system.

Limitations: Research in the midst of a Pandemic

My interviews for research came to a halt when the COVID-19 pandemic shut down non-essential work, including universities and non-profits. Concerns that the coronavirus posed more of threat than initially thought increased during late February and early March, and within a two weeks, the University of Texas at Austin announced it was to be fully remote as did my internship for a non-profit that provided legal assistance to immigrants in Texas. Immigration Courts across the nation closed to the public and suspended and rescheduled all non-detained immigration cases all the way through May 15, 2020. During this time, detention centers and immigration courts still held detained hearings. The non-profit I worked for suspended in-person services in their entirety. During the pandemic, it was virtually impossible to enter detention centers because legal services and attorneys had to secure their own protective gear as ICE did not provide it to them. The non-profit I worked for found ways to work remotely with the detention center and continue legal services. Not all non-profits and advocacy groups, however, found ways to work with detention centers to continue providing their services. Different private companies contract detention centers and each have their own rules. The ability for the

continuance of legal serveries depends on the relationship between outside groups providing the services and the detention centers.[84]

Needless to say, conducting research during this unprecedented crisis presented many hurdles to overcome. However, the pandemic also provided a unique opportunity to probe the benefits of video teleconferencing. Without video teleconferencing capabilities in both immigration courts and detention centers, all asylum and relief claims would have completely halted leaving thousands more people in limbo. The next three sections analyze the past, present and future of the use of video teleconferencing in immigration hearings.

Part II: The Impact of Video Teleconferencing in Immigration Court Proceedings

Literature Review

This section summarizes several ways in which scholars have approached looking into the effects of VTC on immigration court proceedings. The first portion of this section presents studies and researches the psychological effect of video-mediated communication. The second part focuses on summarizing the article, "Remote Adjudication," by Ingrid Eagly, a Professor of Law at UCLA. In the article, Eagly uses court data to draw conclusions about the ways in which VTC effects the final outcomes of immigration proceedings. Through doing so, she makes data-based claims about the real impact of video teleconferencing, which she supports with qualitative evidence from her own experience as an immigration professor, interviews with immigration judges and other immigration experts, and personal experiences in immigration courts and detention centers around the nation. Eagly's quantitative and qualitative findings will be used as reference to gauge the change in VTC use today in Part III.

[84] Immigration non-profit employee, telephone conversation, April 21, 2020.

Although research of the use of video teleconferencing in immigration court proceedings is limited, existing studies have adopted two distinct methods of scholarship. One presents an argument rooted in communication and psychological studies. The other, which Eagly pioneered, uses comparative data from the outcomes of in-person asylum cases versus those conducted through VTC. Both methods present valuable insights that merit consideration.

Communication and Psychology Research of Video-Mediated Communication

Videoconferencing changes the psychological effects of communication. In 2006, Aaron Haas, a judge at the 285th district court in San Antonio, published an article, "Videoconferencing in Immigration Proceedings," in the University of New Hampshire Law Review, where he conducted a survey of research—old and new—pertaining to the psychology of communication inside and outside of the courtroom.[85]

Outside the courtroom, Haas found that video-mediated communication caused a strong emotional disconnect between the actors involved. Invoking Marshall McLuhan, a Canadian philosopher who studied media, Haas explored the idea that "the medium is the message," arguing that the means by which content is delivered often overshadows the meaning of the content itself. He pointed to the 1960 presidential race between Richard Nixon and John F. Kennedy to substantiate his claim. During the campaign, radio listeners favored Nixon, while television viewers strongly preferred Kennedy. Scholars like James N. Drukman have argued that images shape opinions people form of others—in the case of the presidential debate, television images "affec[ed] the overall debate evaluations, prime[ed] people to rely more on personality perceptions in their evaluations, and enhance[ed] what people learn[ed]." [86]

[85] Haas, "Videoconferencing in Immigration Proceedings.",
[86] James N. Bruckman, "The Power of Televison Images: The First Kennedy-Nixon Debate," *The Journal of Politics* 65, no. 2 (2003): 559–71.

Considering today, the idea that the medium alters the reception of the message itself still remains true.

President Trump is unique among presidents in the way he has used social media—and especially Twitter—to disseminate information and communicate with the American public. At the beginning of his presidency in 2016, he tweeted upwards of nine times per day.[87] The *New York Times* called Twitter "a digital howitzer that [Trump] relished firing."[88] Many polls found that Republican net approval for Trump increased after tweeting racist remarks such as "go back" to representatives Ilhan Omar (D-MIN), Rashida Tlaib (D-MI), Alexandria Ocasio-Cortez (D-NY) and Ayanna Pressley (D-MA).[89] However, since Trump has conducted daily press briefings at the White House to address the COVID-19 pandemic, his net approval fell 22 points since March 17, 2020.[90] Similar to the Nixon-Kennedy first presidential debate, Trump's approval dropped as he more appeared more frequently on television, thereby demonstrating the impact of the visual medium. I cannot claim with certainty that Trump's approval rating would be higher if he used Twitter alone, but the precipitous decline in approval appears to correspond with his daily White House briefings. The economic downturn and general uneasiness for the United States during the pandemic has likely affected his approval ratings, as well.

Haas also speaks to the importance that nonverbal communication (NVC) plays in the process of generating meaning through words.[91] Albert Mehrabian, a psychologist at UCLA,

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[87] Michael Shear et al., "How Trump Reshaped the Presidency in Over 11,000 Tweets - The New York Times," November 2, 2019, https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html.
[88] Shear et al.
[89] Jessica Campisi, "Trump Sees Republican Support Rise after 'go Back' Tweets: Poll," Text, TheHill, July 17, 2019, https://thehill.com/blogs/blog-briefing-room/news/453441-trump-sees-support-from-republicans-rise-after-go-back-tweets.
[90] Eli Yokley, "Net Approval of Trump's Coronavirus Response Reaches New Low," *Morning Consult*, April 27, 2020, sec. Coronavirus, https://morningconsult.com/2020/04/27/trump-coronavirus-net-approval-new-low/. (Forty-four percent of the U.S. population found the briefings infomrative, 54 percent found them frustrating, 47 percent found them counter-productive, and 29 percent found them presidential)
[91] Haas, "Videoconferencing in Immigration Proceedings.", 69-70.

found that communication entails three elements—words, tone of voice and body. Those three elements are governed by the 7-38-55 percent rule, suggesting seven percent of communication is about the words, 38 percent of communication is based on tone of voice, and 55 percent is based on body language. Meaning in words only emerges where speech communication and gesture communication meet. The intersection where meaning is created was coined as the "growth point" (GP) by David McNeill, a Professor Linguistics at the University of Chicago. [92] Elements that are essential to human communication, particularly eye contact, suffer as a consequence of video-mediated communication. According to an article published in *Displays*, an international journal covering research and development of display technology, eye contact during conversation directly impacts social constructs like trust.[93] "Virtual eye-contact" is difficult to achieve in video-mediated communication because of logistical issues, such as the placement of the video camera with respect to the video screen. Subconsciously, the same level of trust built in face-to-face interactions does not occur over videoconferencing.[94]

Haas also observes that people cognitively respond to images on a screen in much the same way as interactions in "real life." For instance, watching someone eat a sandwich in real life would light up similar regions of the brain as watching someone eat a sandwich on a computer screen. Although that observation may appear to support the use of video teleconferencing, it actually presents larger issues. If an askew camera or monitor makes "eye-contact" impossible, or if the video connection lags or delays responses, those actions could be interpreted as real actions and intentions by other participants on the call. Although, those on the call consciously grasp they are communicating through video technology, subconsciously the

[92] Haas. 68.
[93] Leanne Bohannon et al., "Eye Contact and Video-Mediated Communication: A Review," *Displays* 34, no. 2 (April 2013).
[94] Bohannon et al.

brain does not differentiate in-person and video-mediated communication. Hass writes, "as video mediated communication distorts and diminishes [non-verbal] cues…the ability of the audience to distinguish between what they are seeing and real life will lead them to draw different and more negative conclusions about the individual than they would if [the individual] was actually present." [95] Overall, video-mediated communication obscures important non-verbal cues that are central to the process of building trust while communicating. Video teleconferencing further diminishes the emotional connection between participants and is subject to the technical difficulties explained above.

Empirical Findings of the Use of VTC in Immigration Court Proceedings

In 2015, Ingrid Eagly published an article in the *Northwestern University Law Review* that empirically analyzed millions of data points from the EOIR to compare the outcomes of immigration proceedings conducted via video teleconferencing versus in-person.[96] Contrary to what many advocates and legal scholars believed, Eagly discovered that video adjudication did not have a direct impact on the final decision judges made with respect to the relief claim of the respondent; judges made their decision based on the facts presented to them. However, video teleconferencing immediately impacted whether or not a respondent filed an application for relief, as well as the respondent's overall level of engagement with the adversarial processes involved with applying for asylum or other forms of immigration relief in the United States. In general, respondents processed through VTC disengaged with the processes outside of the courtroom that substantially affect the strength of their appeal. Eagly analyzed data by conducting observational studies of large data sets of information that were subject to the natural flows of immigration patterns and how accurately the data was recorded by the EOIR. Eagly then

[95] Haas, "Videoconferencing in Immigration Proceedings." 67
[96] Eagly, "Remote Adjudication in Immigration."

prepared the data by using only similar court cases and verified her findings by using three different statistical models of analysis. Her data uses points from FY 2011-2012 because prior to 2007, the EOIR poorly recorded the use of VTC. As a result, Eagly analyzed the most recent and complete years of data available to her.[97]

Beyond observing the disengagement of litigants, she found that ICE and EOIR used VTC almost solely for detainees and that the majority of cases that started via VTC ended with VTC. In 2012, detention centers and immigration courts unevenly distributed the use of video teleconferencing capabilities, making graphical location determinative as to whether or not VTC would be used. Of 60 immigration court jurisdictions in 2012, 84 percent of all televideo hearings were conducted in only 15 jurisdictions [98] ICE and the EOIR used VTC mainly for detained immigration hearings, and Eagly emphasized that "rather than a neutral adjudicate tool, televideo should be understood as an intentional design element of the rapid evolving detention-to-deportation pipeline."[99] The increase in the use of VTC directly correlates with the increase in the practice of detaining immigrants during the Bush Administration in the post 9/11 immigration era. By 2008, the proportion of detained immigrants reached an all-time high of 58 percent. Once President Obama took office, the level of detention decreased to as low as 11 percent. However, since Trump assumed office in January 2017, detention rates have surged as the administration has reinstated zero-tolerance policies that mandate detention over parole or bail.[100]

[97] Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 108, no. 4 (2015): 960.
[98] Eagly. 956.
[99] Eagly. 956.
[100] "Where Are Immigrants with Immigration Court Cases Being Detained?," Immigration Details (Transactional Records Access Clearinghouse, March 29, 2018), https://trac.syr.edu/immigration/reports/504/.

Eagly observed the majority of cases that began in one medium—in-person or through video teleconferencing—stayed in that medium for all hearings.[101] Hybrid cases with both VTC and in-person hearings were much rarer. They occurred under two scenarios: either VTC equipment was not available because of technical issues, courts transitioned their dockets to televideo, or a non-detained person had their first Master Calendar Hearing in-person and were then detained and subject to a video teleconferenced individual merits hearings.[102]

Eagly used three different types of analytical tools—a national sample, an active base city sample and finally a regression analysis of the active base city sample. The results of her analysis heavily rested upon the two-step nature of the asylum process: procedural outcomes and trial outcomes. Procedural outcomes include obtaining an attorney, applying for relief, and/or applying for voluntary departure trial; these outcomes occur occasionally before but more commonly after the Master Calendar Hearing. Trial outcomes include termination of the case, relief, or voluntary departure; these occur after the Individual Merits Hearing.

For a national sample, Eagly considered 153,835 immigration cases across the U.S. during the fiscal year of 2011 and 2012 and removed any outlying cases. She discovered that detained VTC cases had less engagement with adversarial processes. Cases reviewed through VTC from the onset were less likely to obtain counsel, complete a form for relief, or request voluntary departure. She also found that immigration judges spent less time overall with VTC cases and completed such cases earlier than in-person cases by an average of 38 days. VTC cases were much less likely to request continuances and move to an individual merits trial due to the absence of legal representation and failure to complete a full and correct relief application.

[101] Eagly, "Remote Adjudication in Immigration." 955
[102] Ibid.

For active base cities, Eagly focused on a subset of cases that adjudicated at least 1,000 televideo cases and 1,000 in-person video cases between the 2011 and 2012 span. This approach sought to avoid fluctuations in national data based on inconsistent VTC capabilities across states. Eagly observed once again that significantly fewer detainees that used VTC had legal counsel, applied for relief, and requested voluntary departure. However, after she looked at the respondents who sought relief (meaning they had successfully applied for relief in the United States) both in-person and VTC hearings had a 40 percent success rate. The outcome of the entire proceeding, from the EOIR issuing an NTA to the Master Calendar hearing, and if applicable, bond, parole, and individual merits hearing, a larger, statistically significant amount of VTC cases end in removal compared to in-person cases. Yet, when only focusing on trial outcomes, which assumes the respondent filed an application for relief and saw a judge for an individual merits hearing, the communication medium of the hearing did not play a significant role on the final outcome of the case.

The principal take away from those findings is that detainees seen through VTC are less likely to successfully navigate the immigration system due to their inability to engage directly with the legal system. However, if they managed to successfully apply for relief, the immigration judge generally makes a final decision on their case based on the legal fact presented to them without the interference of a typical hearing. Therefore, previous scholarship exploring the impact of VTC (like Hass) did not fully grasp the impact that processing detainees through VTC could have on the procedural outcomes of cases.

In fact, restricting access to the legal resources necessary to navigate the U.S. immigration system exposes much deeper, more structural inequities in our asylum system. The prevalence of video-mediated communication is but a symptom of this inequality, "a tool in the detention-to-

deportation timeline." Through the expansion of VTC, USCIS has foreclosed justice for asylum seekers, particularly detainees, barring access to individual merits hearings and other avenues for legal status in the United States. [103]

In part II, Eagly reflects on her own experiences in court rooms, detention centers and interviews with immigration experts. Through her interviews and personal experiences, she identified three main areas where VTC significantly impacted immigration hearings: respondent alienation, complications of litigation mechanics and disruption of working courtroom mechanics.

When forced to rely on VTC, respondents expressed indignation. Most video rooms in detention centers are no more than a small room with a TV. Eagly said:

> "I had a similar reaction to the starkness of the video appearance rooms. Some of the hearing locations appeared to be broom closets equipped with a television and monitored by a guard sitting in the hallway. Others were larger utility-style conference rooms with gleaming concrete floors where respondents wearing prison-issued jumpsuits sat in rows of plastic lawn chairs—always in the presence of a guard rather than court staff. After their cases were called, the detainees were taken back to their cells in groups by a second guard.204 The entire experience was full of constant reminders that we were in a jail, rather than a courtroom."

Because of the discontent between respondents and the court, many immigrants do not understand the gravity of the situation or recognize the importance of the hearing in the same way if they were present in a courtroom. Eagly found that "respondents appearing in Master Calendar Hearing in the removal video room often appeared confused and unsure where to focus their eyes or direct their voices."[104] This recalls Haas' observation that participants in video-mediated conversations lost emotional connection and trust that would otherwise have been established vis-à-vis non-verbal communication.

[103] Eagly, "Remote Adjudication in Immigration."
[104] Eagly. 990.

Immigration hearings via video teleconferencing further complicated the mechanics of litigation. In-person detainees (very rarely) can file their application for relief and use the time with their attorney to complete any unfinished paperwork. However, with VTC, all parts of the application must be mailed to the courtroom in advance of the hearing. Detainees, especially pro se detainees, litigants without legal representation, cannot mount a strong case against their removal.

Generally, remote adjudication complicates the lawyer-client relationship. Immigration attorneys may be less involved with cases because of the difficulty associated with speaking to their client. Additionally, during hearing, attorneys cannot hold confidential recess with their clients. With VTC, most attorneys conduct any interaction with their client over the screen in front of the judge and government attorney. For that reason, many immigration attorneys prefer to remain in the courtroom with the judge instead of the detention center with clients because they are, "less likely to alienate the judge and it allows the attorney to participate in off-the-record discussions with the prosecutor and the judge." [105]

Similarly, Eagly discovered that VTC interrupted the court room work group. Immigration court is an intimate space where the "players in immigration court know one another and work cooperatively and informally to determine the outcome of their cases."[106] The informal give-and-take practices of the immigration court are central pieces to the outcome of many cases. Yet VTC removes the respondent almost completely from the specificities and nuances of the court room that can play crucial roles in determining the approval of relief. Eagly mentioned that:

> The reduction in interaction between the televised respondent and the other courtroom players was striking. At the formal courtroom end of the hearing, the detained appearing on the screen was only treated as a participant in the proceeding when directly asked question by the judge or by the counsel

[105] Eagly. 992.
[106] Eagly. 989

> while testifying. At other times during the hearing, the court room players generally did not look at or engage with the video screen.[107]

The respondent, arguably the most important person in the trial, is left on the outside of their own proceeding.

Part III: Qualitative Research

The following section revisits Eagly's findings from her research in 2015 to evaluate how the Trump Administration uses VTC and how VTC's impact has changed over the eight-year period between 2012 and 2020. Unlike Eagly, I was not able to use large datasets made available through being a TRAC fellow. However I recreated her qualitative research to the best of my ability. The following section will refer to my experience as an undergraduate student working at a non-profit that provides legal services to immigrants and detainees in the Texas area, visits to the John T. Hutto detention center, observations at an immigration court proceeding and interviews with immigration attorneys and University of Texas Law students. To make my findings easy to understand and directly comparable to Eagly's conclusions, I will be answering the following questions:

1. *Does the EOIR reserve the use of VTC for detained cases?*
2. *How do Immigration attorneys judge the level of alienation felt by respondents because of the use of VTC?*
3. *What litigation mechanics complications does VTC Cause?*
4. *How does VTC disrupt the courtroom working group?*

VTC Use for Detainees

Does the EOIR still reserve the use of VTC for detained cases?

[107] Eagly. 992

In her studies, Eagly observed that immigration courts used VTC mainly for detainees with the intention of faster detention center processing. In 2020, that still proves true and immigration courts still predominately use VTC for detained proceedings. In the first quarter of the 2020 fiscal year (October 2019-December 2019), three-fourths of detained Master Calendar hearings which reached a decision forty-four percent of credible fear hearings that reached decisions were completed through VTC.[108] In general, in the first quarter of 2020, considering only final Immigration Court hearings, 17 percent of hearings were held by VTC.[109]

The use of VTC in detention centers across the United State is also still skewed. Eighty-four out of 185 detention facilities currently have VTC capabilities.[110] Even within the select group of detention centers that use video teleconferencing, certain detention centers use their VTC technology more than others. For example, the Houston Service Processing Center completed close to all of its 818 hearings during the first quarter of 2020 via VTC. [111] Other locations, however, like the Atlanta Detention Center, only completed 13 out of 243 proceedings through video. All courts have different technical capabilities with respect to video teleconferencing and today, several detention centers even have immigration courts within them. As shown in figure 3.1, during the first quarter of the 2020 fiscal year, Texas held the most final hearings through a video medium.[112] But the figure is slightly misleading because of the large amount of migrants who cross the border and are tried in Texas compared to other states. To take the relative flow of immigrants into different states into consideration, Figure 3.2 graphs the percentage of final hearings completed with video teleconferencing and to ensure that states with

[108] "Use of Video in Place of In-Person Immigration Court Hearings," accessed January 30, 2020, https://trac.syr.edu/immigration/reports/593/.
[109] "Use of Video in Place of In-Person Immigration Court Hearings."
[110] "Use of Video in Place of In-Person Immigration Court Hearings."
[111] "Use of Video in Place of In-Person Immigration Court Hearings."
[112] See Appendix A

a small number of total final hearings did not skew the data, the figure below only considered states that completed over a total of 1,000 final immigration hearing during the allotted time.[113] The graph shows that courts in New Mexico, Virginia, Texas and Illinois are most likely to use video teleconferencing. TRAC did not have data available about the number of detainees from the first quarter of the fiscal year of 2020, but they did have data available about the amount of detainees per state, county, and detention center for individual months in 2019. From April till July (the last set of available data), Texas unequivocally and consistently had the largest number of detainees, followed by Louisiana, then Arizona and California. Figure 3.3 shows the number of detainees per state from July 2019.[114] Looking at the data presented by both figure 3.2 and figure 3.3, there is not a strong correlation between the number of detainees and the level of VTC used.[115] New Mexico had only 549 detainees total in the month of July 2019, but immigration judges used VTC for over 50% of detainees' final hearings between October 2019 and December 2019.[116] This suggests that the use of VTC heavily relies upon the abilities of the detention center and immigration court, as well as the number of detainees at any given period. Detainees in New Mexico are significantly more likely than detainees in Arizona, for example, to face VTC in their hearings, ultimately impacting their chance of a successful asylum claim.

Upon examination of data from detention centers and their use of VTC from the first quarter of the fiscal year of 2020, the majority of cases for MPP "port courts" were recorded as in-person hearings. Of the three MPP courts currently open and operating at the South West Border of Texas—El Paso port of entry, Brownsville Gateway International Bridge, and the Laredo port of entry—the government reported that close to 90 percent of final hearings were

[113] See Appendix A
[114] Ibid.
[115] Ibid.
[116] "Use of Video in Place of In-Person Immigration Court Hearings."

held in person. The stats are similar for MPP courts in Calexico and San Ysidro, California and the El Paso Border Patrol Station in New Mexico.[117] This data is misleading, however, because port courts built for the purpose of adjudicating MPP cases rely almost entirely on VTC. Data from TRAC suggests otherwise. The discrepancy between the data and reality suggests that DHS and EOIR are misclassifying MPP hearings as in-person hearings rather than video teleconferenced hearings. This lack of transparency supports the notion that the Trump Administration has been operating the MPP courts with impunity.

Respondent Alienation

How do Immigration attorneys judge the level of alienation felt by respondents because of the use of VTC?

My interviews and research suggest that respondent alienation due to VTC is a growing problem, especially for those placed in MPP. The conditions of video rooms in detention centers that detainees must use for their hearings are similar to this in Eagly's study. A law student at the University of Texas who has participated in VTC immigration proceedings described the VTC rooms in the John T. Hutto detention in the following terms:

> "So small and there's not enough room on the video screen for there to be more than two people in the shot. There are no windows. Many of the clients I have had described it like a closet. And for people who are victims of trauma or torture, it's [common] for it to be similar to the space where they were tortured.[118]

[117] "Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases." Percentage of In-person final hearings at MPP courts from Q1 of FY 2020: El Paso non-detained—86%, Brownsville Gateway International Bridge—98%, Port of Entry Laredo, Texas—99%, El Paso Border Patrol Station, New Mexico—46% (the other 54% were held via telephone not VTC), Court Calexico Port—97%, Court San Ysidro Port—99%

[118] Interviewee #3, interviewed by the author, Austin, Texas, February, 29, 2020.

Isolation from the court room and placement in a small isolated "closet" make the proceedings seem less "real" even though the fate of the respondent's future rests upon the decision made by the judge.[119]

Video teleconferenced hearings also contribute to a lack of understanding by the respondent. When courts use VTC and the respondent does not speak English proficiently, the court provides an interpreter. However, the court has a limited number of in-person interpreters that speak foreign languages other than Spanish, especially indigenous languages of Mexico and Guatemala. The judge usually relies on a telephone interpreter in lieu of a real person. In such cases, not only is the respondent obligated to communicate with an immigration judge through a video medium, but they must also parse out the nuances of the proceedings through a distant interpreter via court room phone.[120] As a consequence, "there's a huge disconnect and nobody knows what their rights are."[121] Due to communication difficulties, judges often cut respondents off mid-sentence or ask them to clarify what they mean. During an immigration court proceeding I observed with a Texas Immigration judge, a notoriously stern judge, asked the respondent to clarify their statement's eleven different times. Both the judge and the respondent visibly became frustrated with one another.[122]

Complication of Litigation Mechanics

What litigation mechanics complications does VTC cause?

Since 2012, there have been no substantive improvements to the quality of VTC proceedings. Proceedings held via video teleconferencing are still unable to make efficient use of

[119] Interviewee #4, interviewed by the author, Austin, Texas, February, 29, 2020.

[120] Interviewee #3, interviewed by the author, Austin, Texas, February, 29, 2020.
[121] Ibid.
[122] Observation of an individual merits hearing via VTC in the San Antonio immigration court.

paperwork or courtroom strategies like in-person hearings. Detained respondents still must send their completed relief applications and burden of proof via fax or standard mail in advance of their scheduled hearing. If the respondent fails to do so, the judge will likely reset the hearing, prolonging immigration limbo for detainees. Attorneys still voice frustrations with the inefficiencies of immigration court cases as they applies to hearings held through VTC.

Beyond contributing to respondent alienation, MPP has worsened litigation mechanics. A Texas attorney expressed his dissatisfaction with MPP and VTC being used in conjunction with one another. He disclosed that

> "The other problem [with VTC] is that logistically, filing documents when you can't be in front of a judge is really annoying. Normally you can just hand the judge documents, including the respondent's burden of proof, which is used to prove the respondent has a credible fear of being harmed based on one of the protected grounds. But to do that, they have to produce evidence in support of their claim, and if they can't, their claim will be denied. But, how do you produce those documents, especially if you are in Mexico. I mean, do you do international mailing? You could do that, but it is expensive. At VTC you most commonly hand your documents to a guard and the guard has to fax it. Some of these documents in support of an asylum claim are close to 100 pages…Faxing 100 pages takes time, it is impractical, and some judges will reset the hearing because they don't want to wait they have a busy and full docket…On top of that, in all proceedings you are expected to give a copy to opposing counsel. So, then the court has to make copies of what you've faxed over.[123]

Respondents in VTC proceedings still struggle with an ability to directly access judges. not Many essential aspects of immigration proceedings, like submitting applications and documents, are stuck in an analog past, even though DHS and the EOIR tout the technological advancements of VTC. Problems with litigation mechanics demonstrate how the government wants to increase

[123] Interviewee #1, interviewed by the author, Austin, Texas, February, 29, 2020.

the number of immigration proceedings held through video, but without attending to any of its drawbacks.

Courtroom Workgroup

Is the courtroom working group still disrupted because of VTC?

Video teleconferencing continues to disrupt the dynamics of courtroom working groups in much the same way as 2012. Attorneys are still unable to communicate confidentially with their clients. Respondents are still excluded from off the record conversations. And respondents are still ignored by court room players like the judge and trial attorney. MPP has only exacerbated this isolation.

For immigrants with legal representation, courts have prevented attorneys from communicating with their clients privately during video teleconferenced trials. When I observed an individual merits hearing conducted through video, the immigration attorney sat at a steel rectangular table. The government attorney sat at the opposite side of the room and the respondent was displayed on a TV on a side wall. I could only see the respondent's face and shoulders because of camera angle. The respondent consistently made eye contact to the upper left corner of the screen. The attorney I shadowed explained to me that the judge, who had two computer screens before him, had the respondent displayed on just one. Throughout the entire trial, even during five minute breaks when the judge left the court room, the attorney did not exchange any pleasantries with the respondent, give any advice, or clarify any confusions the during the proceedings because the government attorney remained in the room at all times. Communication independent of the TA and general court room audience, like myself, was virtually impossible.

The video medium also excluded the respondent from off the record conversations and interactions that commonplace in any courtroom. I had not observed an immigration court proceeding before and I was shocked by how little the judge, government attorney, and immigration attorney acknowledged the respondent. After the case was concluded and the judge left the courtroom to consider the evidence of the case, the immigration attorney and government attorney struck up a casual conversation while the respondent awaited the approval or denial of their asylum claim. I found the stark contrast between the gravity of the moment on one hand and the casual, easy-going conversation on the other perplexing.

Although I did not experience any technical difficulties in the individual merits hearing I observed, technical issues caused by VTC disrupt many hearings. One attorney related the complications that occurred in the courtroom during a VTC trial with her client.

> "I had one client where we had many many technical issues making it extremely difficult to argue her case. Luckily, she won, but during the trial she was crying and you could only see her forehead. On top of that, the entire call was fuzzy. Overall, we won, so that was a good experience, but [VTC] definitely detracted from the story my client was telling…Judges also get frustrated while working with clients over VTC because they cannot communicate efficiently and truly hear the story of the litigant. That negatively effects the client. Having a frustrated judge looking over your case is not what you want."[124]

Even when video teleconferencing works well, like in the case that I observed, empathizing with a story and communicating effectively remain difficult. When technical difficulties plague a video mediated hearing, judges become frustrated and respondents comprehend less of the proceeding. Like the case presented above, video teleconferenced hearings do not always inevitably end in removal, but they do not make the process any easier or more efficient for any of the parties involved.

[124] Interviewee #4, interviewed by the author, Austin, Texas, February, 29, 2020.

Generally, I found that many of the issues raised by Eagly in 2015 about the consequences of video teleconferencing still apply today.

Part IV: Suggestions on How to Use VTC

This section presents ways to mitigate the negative effects of video teleconferencing in the courtroom.

1. Ensure the reliability and uniformity of all video teleconferencing technology used across the nation.

Technological issues should not impact respondents' understanding of their legal rights and the steps necessary for them to apply for relief. To prevent unnecessary impediments during court proceedings, DHS and the EOIR must regularly conduct maintenance on video teleconferencing equipment in immigration courts, detention centers and Migration Protection Protocol court tents on the border. If the technology is out of date or presenting issues, the court should be obligated to temporarily halt video conferences with that equipment until it's replaced. This is especially true for tent courts.

2. Provide a confidential way for attorneys and respondents to communicate during hearings.

Respondents and their attorneys cannot communicate with one another during individual merits hearings conducted with video teleconferencing. The government should create a separate phone line for respondents and attorneys to communicate and further provide private rooms both in the detention center and immigration court for them to speak. Although this would not be equivalent to communication that occurs between an attorney and a client in person, it would at least provide a secure and confidential means for communication during the proceeding.

3. Create a more efficient way to send in additional documents for hearings/reduce the amount of paperwork and bureaucracy involved in applying for relief.

There is a large discrepancy between the ease in which respondents via in-person and VTC hearings can turn in necessary paperwork to the courtroom. Respondents in VTC hearings should be given an alternative means outside of mailing and faxing documents to the court. Alternative ways include making a larger portion of relief applications available online, however this would entail detention centers to undergo a large infrastructure change. They would then be obligated to provide a significant amount of internet and computer access to detainees to be able to complete their applications. A more realistic alternative is that the EOIR could create an online website for detainees to upload all of their documents beforehand. Before the trial begins, both the judge and government attorney will have a printed copy of the application, which the respondent would have uploaded several hours to minutes before the case. If there are any last-minute changes or additional signatures necessary, the respondent can fax over the necessary one or two pages opposed to hundreds of pages at the start of the trial.

4. Reserve the use of VTC for trial hearings.

Video teleconferencing does not increase the likelihood of an immigration judge denying relief. However, VTC does impact procedural outcomes that precede individual merits hearings. If a respondent does not understand their rights, the way in which they must present their case, how to fill out an application for relief and how to find counsel, they will likely not have a strong case for their relief claim. Although it may seem counterintuitive, if DHS and the EOIR insist on using VTC, they should use it solely for individual merits hearings and ensure that asylum seekers understand their legal rights and how to navigate the immigration system. At the end of the day, the judge determines the final outcome of the trial based on the facts presented before him. If the respondent, especially *pro se* respondents, do not mount a sufficient and complete case, they will be removed.

Part V: Conclusion

The notion that America is both a nation of law and a nation of immigrants belies historical and contemporary immigration policy. Probing this disjuncture further can help us see the ebb and flow of restrictive and open immigration and asylum policy.

In exploring Trump's assault on asylum, we can identify how small policy and procedural changes can drastically transform (or undermine) the legal system. Since 2016, the Trump administration has uprooted asylum, particularly through the Migrant Protection Protocols, putting thousands of migrants lives at risk. Video teleconferencing may appear to play an insignificant role in immigration proceedings at large, but it is just one weapon in Trump's crusade against legal immigration.

Before immigration courts recorded and released data on VTC use, scholars argued against video teleconferencing by citing research on the psychology of communication. Scholars like Aaron Haas made strong points about the inability to build trust between respondent and judge because of the video mediated communication. Years later, Eagly discovered that the correlation between depressed rates of relief in detained cases conducted via video teleconferencing was a consequence of litigants' disengagement with the legal process. Respondent alienation, complication of litigation mechanics, and disruption of the courtroom working groups adversely impacted VTC hearings in 2012 and, as I found eight years later, in 2020. The Migrant Protection Protocols only exacerbated these problems.

The government intended for VTC to improve immigration courts efficiency. Instead, VTC became a tool of the detention-to-deportation pipeline during the Bush and Obama administration and is now an accomplice to human rights violations committed by the Trump administration's war on asylum. Before the use of VTC increases, the government must seriously

consider what they are destroying in the pursuit of “productivity” and “efficiency” in our immigration system.

Appendix A

Table 1
Immigration Quotas Based on National Origin
(Annual Quota for Each Fiscal Year, Beginning July 1, 1929)

Country or Area	*Quota*	*Country or Area*	*Quota*
Afghanistan[a]	100	Muscat (Oman)[a]	100
Albania	100	Nauru (British mandate)	100
Andorra	100	Nepal[a]	100
Arabian peninsula	100	Netherlands	3,153
Armenia	100	New Guinea, Territory of (including appertaining islands) (Australian mandate)[a]	100
Australia (including Tasmania, Papua, islands pertaining to Australia)	100	New Zealand	100
Austria	1,413	Norway	2,377
Belgium	1,304	Palestine (with Trans-Jordan) (British mandate)	100
Bhutan[a]	100	Persia	100
Bulgaria	100	Poland	6,524
Cameroon (British mandate)	100	Portugal	440
Cameroon (French mandate)	100	Ruanda and Urundi (Belgian mandate)	100
China[a]	100	Rumania	295
Czechoslovakia	2,874	Russia, European and Asiatic	2,784
Danzig, Free City of	100	Samoa, Western (mandate of New Zealand)	100
Denmark	1,181	San Marino	100
Egypt	100	Siam[a]	100
Estonia	116	South Africa, Union of	100
Ethiopia (Abyssinia)	100	South West Africa (mandate of Union of South Africa)	100
Finland	569	Spain	252
France	3,086	Sweden	3,314
Germany	25,957	Switzerland	1,707
Great Britain and Northern Ireland	65,721	Syria and the Lebanon (French mandate)	123
Greece	307	Tanganyika (British mandate)	100
Hungary	869	Togoland (British mandate)	100
Iceland	100	Turkey	226
India[a]	100	Yap and other Pacific Islands under Japanese mandate[a]	100
Iraq (Mesopotamia)	100	Yugoslavia	845
Irish Free State	17,853		
Italy	5,802		
Japan[a]	100		
Latvia	236		
Liberia	100		
Liechtenstein	100		
Monaco	100		
Morocco (French & Spanish Zones and Tangier)	100		

SOURCE: *Proclamation by the President of the United States*, no. 1872, March 22, 1929, 46 Stat. 2984.
[a] Quotas for these countries available only for persons born within the respective countries who are eligible to citizenship in the United States and admissible under the immigration laws of the United States.

Figure 1.1 Example of the Immigration Quotas based on National Origin from the 1924 Immigration Act

Figure 1.2: Political cartoon from 1921 depicting the large amount of Europeans attempting to immigrate to the United States and Uncle Sam only letting the 3% allowed by the quota.

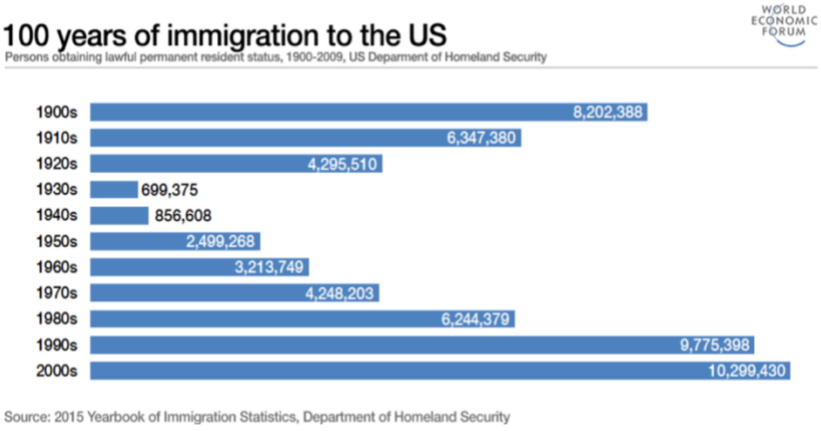

Figure 1.3: Bar Graph of 100 years of immigration to the U.S. provided by the World

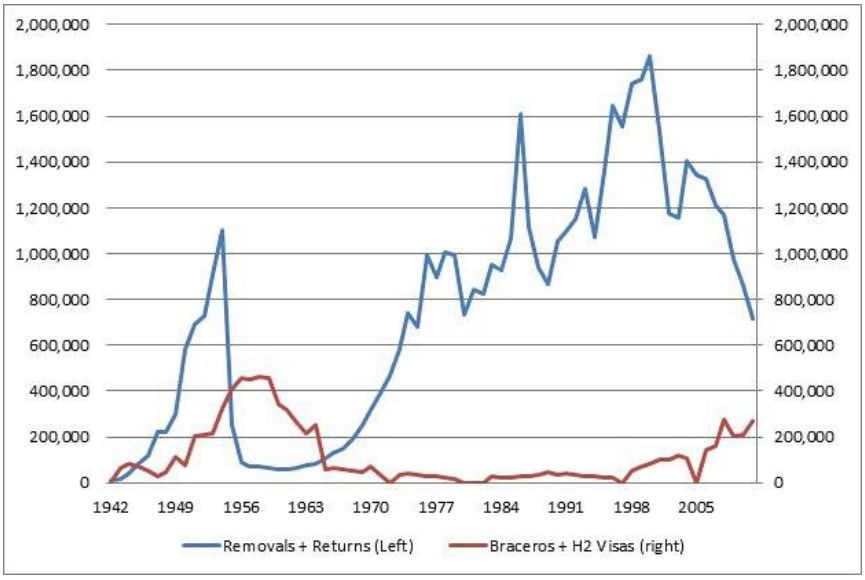

Figure 1.4*:* Removals and Returns of Unlawful Immigrants and Numbers of Guest Worker Vistas between 1942-2011 provided by the Department of Homeland Security and Immigration and Naturalization Services.

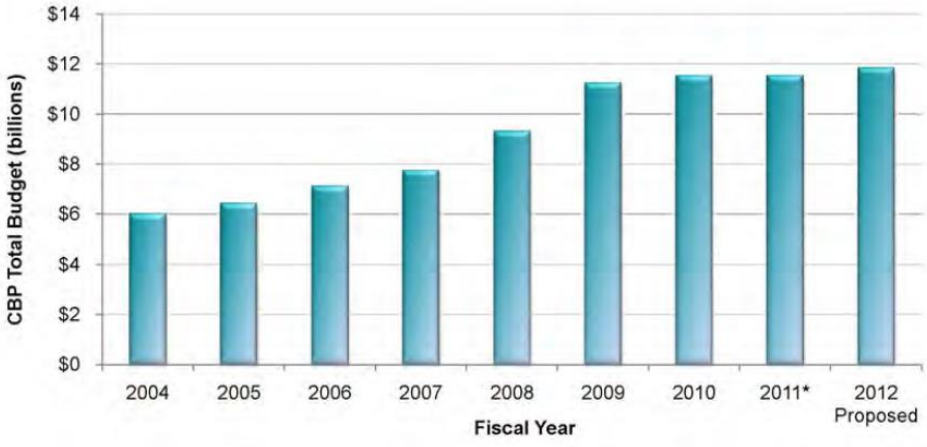

Figure 1.5: CBP's total budget for each year since the creation of CBP

Figure 1.6: Pictures of tent towns on the border of Brownsville and Matamoros

Figure 1.7: U.S. State Department Travel Advisory of Mexico with MPP Cities Marked

Figure 1.8: Port Court in Brownsville, Texas

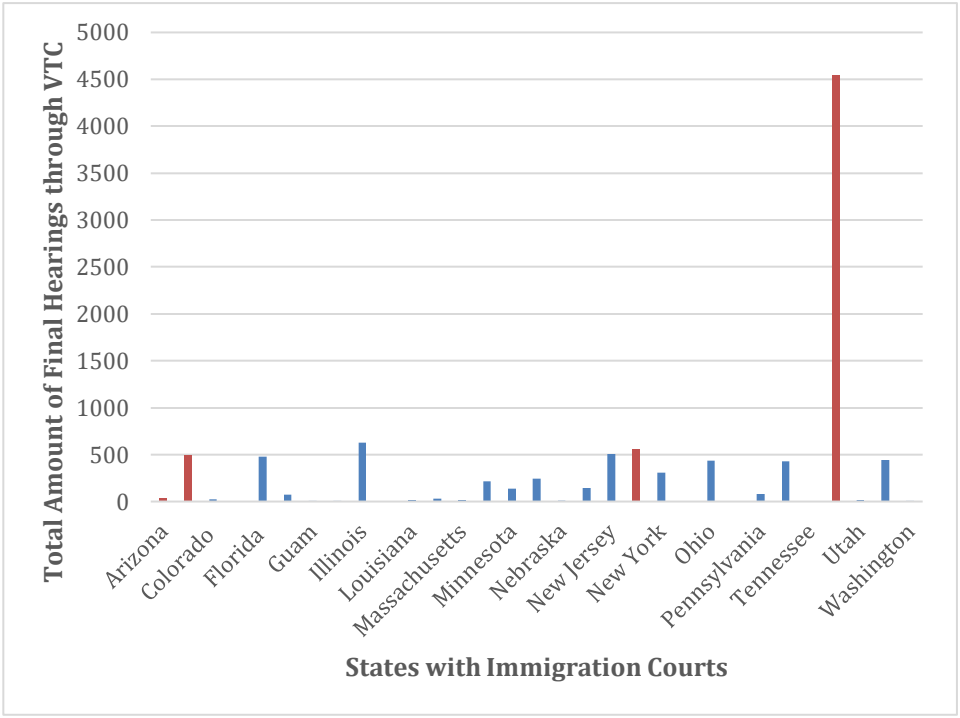

Figure 3.1: Total amount of Final hearings through VTC versus the state they are held in. Orange bars are states on the southwest border of the United States

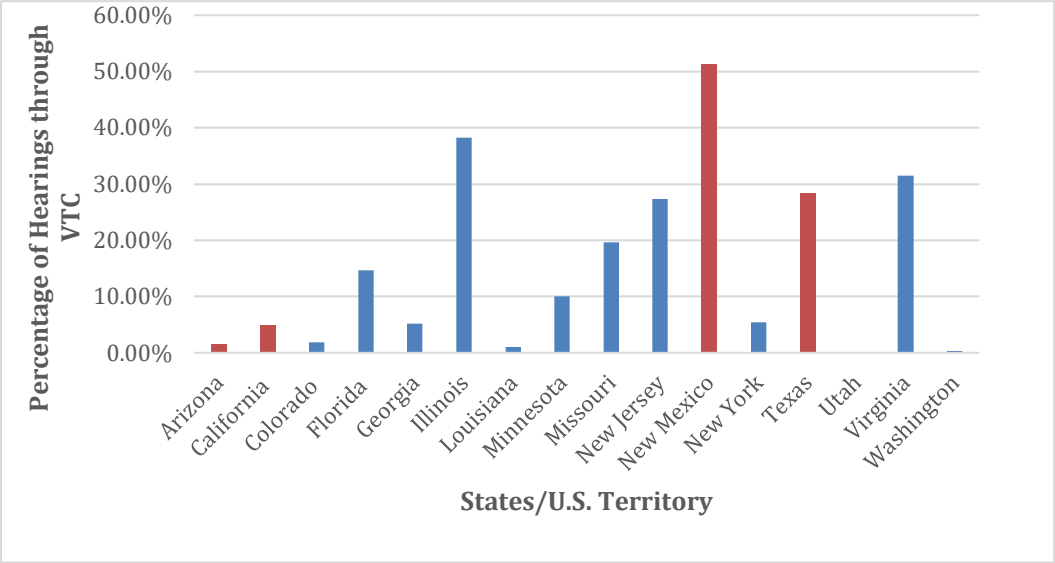

Figure 3.2: Percentage of immigration hearings conducted using VTC versus the state. Orange bars are states on the southwest border of the United States

State	Amount of detainees in July 2019
Texas	16,552
Louisiana	7,907
Arizona	5,499
California	3,944
New Mexico	1,212
Illinois	594

Figure 3.3: The amount of detainees held in detention centers in the four most highly populated states (Texas, Louisiana, Arizona, California) and states with the highest percentage of VTC final hearings from first Q1 of FY 2020 (New Mexico and Illinois).

Appendix B

Interview questions

Skype at the Border: A Qualitative Exploration of Video Teleconferencing Use in Immigration Removal Proceedings in the Trump Era

(Participants will be instructed not to discuss immigration status of individuals or families)

1. What is your experience in the immigration field?

2. How has the implementation of the Migrant Protection Protocols impacted immigration practices at large in the United States?

3. Has it (MPP) impacted your work specifically, if so, how?

4. Have you witnessed or experienced immigration court proceedings via video teleconferencing?
    a. If yes, describe the experience:
        i. Were you in the court room with the Judge or involved/watching in another capacity?
        ii. Was it (video teleconferencing) used in a master calendar hearing or an individual merits hearing or other?
        iii. How was the connection/quality of the call?
        iv. if interpretation was needed, was it provided and effective?
        v. Is there a difference in the way litigants approach the courtroom via video teleconferencing opposed to an in-person hearing?

5. In your opinion, how does video teleconferencing affect overall immigration court proceedings?

6. Is video teleconferencing being used in conjunction with the Migration Protection Protocols to conduct court hearings at the border of Mexico and the United States?

    a. If yes, describe the experience:
        i. Refer to questions 4(a)(i-v)

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Biography

Sydney Arceneaux was born in Houston, Texas on January 27, 1998 and moved to Austin, Texas in 2016 to complete her undergraduate degree. She studied chemistry and Plan II honors at the University of Texas at Austin. In college she led the Texas Real Beauty Campaign for two years and spent her free time being a member of the honorary female spirit organization, Texas Spirits. She plans to attend law school in the fall of 2021 to continue her immigration studies and one day serve the Texas immigration community.